
GREETINGS FROM
WEST VIRGINIA
WEIRTON
WHEELING
MOUNDSVILLE
NEW MARTINSVILLE
MORGANTOWN
APPLES
MARTINSBURG
PARKERSBURG
NEW MARTINSVILLE REGATTA
COAL
ROMNEY
GOOD FISHING
PEACHES
HARRISVILLE
CLARKSBURG
DAIRYING
PETERSBURG
FORESTS
ELKINS
POINT PLEASANT
SPENCER
JACKSON'S MILL HOME OF GENERAL THOMAS JACKSON
GASSAWAY
MARBLE
HUNTINGTON
TOBACCO
CHARLESTON
FORESTS
RICHWOOD
FORESTS
LOGAN
BERRIES
BECKLEY
WHITE SULPHUR SPRINGS
WILLIAMSON
BLUESTONE GAME AREA
SAWMILLING
BLUEFIELD
STATE OF WEST VIRGINIA

- Website - www.wvodc.org

Rules of Professional Conduct, Rules of Lawyer Disciplinary Procedure, Legal Ethics Opinions, Supreme Court decisions, Staff contact information

- Follow the @WVcourts, @EydieNash, @WVStateBar, and @WV_ODC on X (formerly known as Twitter) for the most up to date information.

- Take advantage of numerous FREE ONLINE CLE OPPORTUNITIES offered to you by the WVSB

https://wvbar.org/members/mcle/free-online-cle-opportunities/

- **Rules of Professional Conduct**
  - Adopted by the Supreme Court in 2015
  - Substantially the same as ABA Model Rules of Professional Conduct
  - The RPC govern lawyer's conduct both in representing clients and, in some cases, their private lives. Each rule in the RPC is followed by a Comment section and, where applicable, an annotation to West Virginia cases.

- **Rule of Lawyer Disciplinary Procedure**
  - Adopted by the Supreme Court in 1994
  - In addition to be being published on our website, the Rules of Lawyer Disciplinary Procedure [RLDP] are also published in the Michie's West Virginia Code Annotated State Court Rules Volume.

- **Rules of Evidence**
  - Apply to disciplinary hearings.

Office of Disciplinary Counsel

The Office of Disciplinary Counsel [ODC] is the full-time staff of the Lawyer Disciplinary Board. Disciplinary Counsel serve as legal counsel to the Board. The ODC reviews all complaints filed with the Lawyer Disciplinary Board and investigates where appropriate. The ODC may screen frivolous complaints, may dismiss complaints which after investigation are shown to lack merit, and prosecutes lawyers where complaints do have merit. Duties of the ODC are set forth in the RLDP. The ODC in its discretion may initiate complaints on its own when it learns of a violation but no one has already filed a complaint. The ODC can also petition directly to the Supreme Court in cases in which a lawyer is impaired and unable to practice, has abandoned his/her/their practice, or appears to be a danger to the public.

Lawyer Disciplinary Board

The Supreme Court of Appeals established a Lawyer Disciplinary Board to investigate complaints of violations of the Rules of Professional Conduct promulgated by the Supreme Court of Appeals to govern the professional conduct of those admitted to the practice of law in West Virginia or any individual admitted to the practice of law in another jurisdiction who engages in the practice of law in West Virginia and to take appropriate action in accordance with the provisions of the Rules of Lawyer Disciplinary Procedure. The Board shall consist of twenty-two members, fifteen of whom shall be active members of The West Virginia State Bar and seven of whom shall be members of the public.

- **Investigative Panel Subcommittee**
- **Hearing Panel Subcommittee**

- Office Of Disciplinary Counsel
  - 5 prosecutors
    - Chief Counsel
    - Senior Disciplinary Counsel
    - Assistant Disciplinary Counsel
  - 4 paralegals
  - 1 investigator

- Lawyer Disciplinary Board
- Volunteer Board members:
  - 15 Active Members of WVSB
  - 7 laypersons
- Appointed by the President of the West Virginia State Bar
  - Three-year terms
  - Reappointment

- Complaints from anyone
  - Most complaints arise out of family law and criminal matters
  - No “standing” requirement
  - ODC may initiate its own complaints

- The disciplinary process is started when an orginial sworn, notarized complaint is received by the ODC or when ODC initiates a complaint.
- For policy reasons [protection of the public], and because some of the Rules of Professional Conduct pertain to how a lawyer deals with opposing parties and unrepresented persons,– there is no standing requirement as to who may file a complaint. Parties may, and often do, file against the opposing counsel.
- A lawyer at ODC evaluates the complaint to determine whether it alleges a violation on its face. If not, a letter is sent declining to docket which closes the complaint.
- If a violation is alleged on its face, the complaint is sent to the lawyer for a response.
- The lawyer has 20 days to respond, but may request an extension of time for good cause.
- ODC will conduct an appropriate investigation. If no violations are found, the case will be closed [dismissed] by either the Chief Lawyer Disciplinary Counsel or the Investigative Panel of the Lawyer Disciplinary Board. The closing order sets forth a brief explanation as to why the complaint is closed.
- A Chief Lawyer Disciplinary Counsel closing may be appealed by the Complainant to the Investigative Panel ["IP"].

- In addition to closing complaints, the IP can find probable cause that a violation occurred and issue a Statement of Charges to the Hearing Panel of the Board for a hearing. Alternatively, the IP can issue an Investigative Panel admonishment when a lawyer has committed a violation, but that violation does not warrant formal discipline. The IP also may close [dismiss] a complaint with a caution or warning to the lawyer to change bad practices, thus giving the lawyer a chance to correct the problem.

- If the IP finds probable cause that a violation of the RPC occurred and that a hearing should be held, a formal statement of charges is drafted and filed with the Clerk of the Supreme court of Appeals of West Virginia.

- A Hearing Panel Subcommittee [consisting of Board members who are not on the IP] is appointed. The Subcommittee consists of two lawyers and one non-lawyer. The Subcommittee holds an evidentiary hearing, where an ODC lawyer serves as the "prosecutor" and the Respondent lawyer is usually represented by counsel. ODC has the burden of proving the case by clear and convincing evidence. The hearing is open to the public, testimony is taken and exhibits are offered.

- The Supreme Court reviews all cases in which the IP has found probable cause and issued a Statement of Charges. The Supreme Court is the final arbiter of legal ethics cases.
- The Supreme Court reviews the Hearing Panel Subcommittee's recommendations and may establish a briefing schedule and hold oral argument, particularly if either ODC or the Respondent object to the Hearing Panel Subcommittee's recommendations. The Court can conduct an independent review even if no one objects. The Court applies a de novo standard of review as to questions of law and to determining the appropriate sanction, but gives substantial deference to the Hearing Panel Subcommittee's findings of fact.
- The Supreme Court then issues a decision, which can either be published or unpublished.
- Some cases, such as emergency petitions, impairment petitions, or criminal convictions, go directly to the Supreme Court.
- The Board and Court also hear "reciprocal cases" in which a lawyer who is also licensed in another state is sanctioned in that state for misconduct. Proceedings are then initiated in West Virginia based upon that out-of-state sanction. West Virginia lawyers who are disciplined in other states have an affirmative obligation to report that discipline to ODC.

"I'll have an ounce of prevention."

- I expected more communication.
- I expected to win.
- I expected to get to talk with a Judge.
- I expected to get what my friend/neighbor/acquaintance got.
- I expected not to go to prison.
- I expected another chance.
- I expected to fight to the bitter end.
- I expected to go to trial.
- I expected it to be like television.
- I expected not to look bad to others.

- Communication
  - Talk to your client about **how**, and **how often**, they should expect to hear from you.
  - Follow through – even if just telling the client there's nothing to report.
- Clear, detailed, written fee agreements
  - Explain what the client is paying you for (communicate your value), how much you are charging, and what your billing and trust accounting arrangements will be.
- Discuss your boundaries/set limits
  - Give your client a notebook to record their thoughts and questions for you between meetings or calls.
  - Don't let your client's indignation become your own.
- Ask your client what her goals are. Listen carefully and demonstrate understanding by reflecting them back to the client.
  - Validate those goals, and only afterward gently explain why they might be challenging to meet.
  - Remind the client of her goals every time you talk or meet. Ask if they have changed. Note goals that have been met.

Remind your client that you:

✓Are on their side

✓Love to win

but

✓Will always be honest with them

- **SET THEM & MEET THEM.**
  - Give your clients what they expect
  - …and help your clients expect what will happen.

- "But clients expect too much."
  - Then invest the time and attention to *figure out their goals and shape their expectations.*
  - Provide frank and candid advice about the legal realities of their situation and whether or not, ***in your considered professional opinion***, their desired outcomes can be achieved.

- **Prospects for success** (Keep in mind the client's goals previously explored)
- **Anticipated costs** (Discuss what can cause those to escalate)
- **Timing** (How long will this take? What are the milestones? What are the exit points?)

- We are in the business of delivering news… sometimes it is bad news.
- Our clients often do not expect it. ***They came to you to have their problem solved.***
- Because they do not expect it, they do not believe you.
  - You're in cahoots with the other side.
  - You are incompetent.
  - You have not been working hard enough to win (neglect).
  - If you just did what your client wanted (motions, better witnesses, never sleeping, not sharing negative assessments of the client's facts), the bad news would not happen.

- Lawyers love to talk.
- When sharing difficult-to-digest news with a client, or when waiting for a client to be receptive to your assessment of the situation and recommendations for next steps, BE QUIET.
- Stop. Let them think. Wait for them to ask.
- When you cannot stay quiet any longer, prompt with, “This is a lot to digest. What questions can I answer for you?”

- Blogging, tweeting, posting on Facebook about cases
- The brave new world of online reviews
  - Responding to online reviews
  - Discounts for online reviews?
- "Friending" and "following" people
  - Clients
  - Judges
  - Opposing counsel
- Advertising and solicitation
- Obtaining and protecting electronically-stored information
- Practicing law via text message (bonus advice: DON'T.)
- Fake social media accounts

- **1.6 – confidentiality**

  - Remember, 1.6 is BROADER than attorney-client privilege
  - Information made public via another outlet (Court order, client disclosure) remains subject to this confidentiality duty
  - "The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge." – ABA Formal Opinion 480, released March 6, 2018: "Confidentiality Obligations for Lawyer Blogging and Other Public Commentary."
  - Cannot cloak it behind "hypothetical" label if it is reasonably likely that a 3rd party could determine the identity or situation of the client.
  - 1st Amendment free speech rights may be curtailed.

In order to comply with Rule 1.1 (COMPETENCE) of the Rules of Professional Conduct, attorneys should both have an understanding of how social media and social networking websites function, as well as be able to advise their clients about various issues they may encounter as a result of their use of social media and social networking websites.

Comment 8 to Rule 1.1 provides that "[t]o maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

West Virginia has adopted the ABA technology amendments to the RPC that require competence.

The Florida Bar increased the CLE requirements to include 3 type specific credit hours in technology.

The Rules do recognize a duty to remain competent and that may include a duty to understand technology, how to use technology to investigate a case, and how to effectively represent your client in a digital age. The internet provides a window into the daily thoughts, musings and activities of a massive amount of people. WITHOUT A DOUBT social media has impacted the practice of law.

- Many practitioners advise clients to stop posting new material on social media at the outset of representation.
- Social media content is generally held to be discoverable, even if privacy settings are high (no reasonable expectation of privacy once placed online).
  - But note that most Courts do not allow unfettered "fishing expeditions."
  - Your mileage may vary…Courts generally require a factual predicate demonstrating relevance, and many Courts will not simply order disclosure of a password.
  - Some Courts will conduct *in camera* review of social media information.
  - Subpoenas sent directly to providers generally get nowhere.
- You may consider a preservation letter directed to the opposing party/counsel – this should ideally be tailored to the specific facts of your case.
- Consider requests for admissions to authenticate social media posts.

Although attorneys are not responsible for the information their clients post on the clients' social media profile, attorneys may and often should advise their clients about such information.

Attorneys MUST ensure that their clients are aware of the consequences of their actions via social media and social networking websites, as it is reasonable to expect that their clients' activities will be monitored by opposing counsel and others. Entire cases have crumbled because of posts on social media.

Additionally, attorneys may wish to monitor their clients' use of social media and social networking websites, as doing so may be helpful for attorneys to stay abreast of matters that may impact their clients' legal disputes.

Furthermore, attorneys should also be mindful of the consequences of their own actions when advising and instructing their clients about their clients' use of social media and social networking websites.

A number of state courts nationwide have held that lawyers have a duty to make use of online resources to investigate and pursue cases on behalf of clients.

Attorneys may advise their clients to change the privacy settings of their social media pages so as to restrict or expand whom may see the information shared on such pages. Believe it or not– there are privacy settings on accounts and it is wise to advise your clients to limit the exposure of their personal lives.

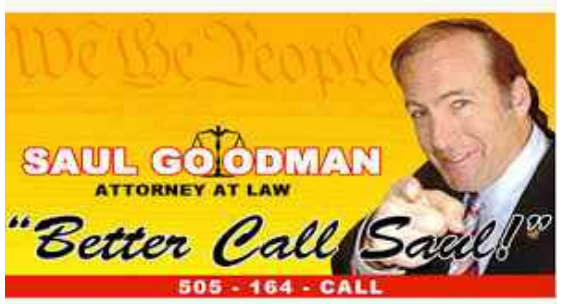
Attorneys may not, however, instruct their clients to destroy, alter or conceal any relevant content on their social media pages.

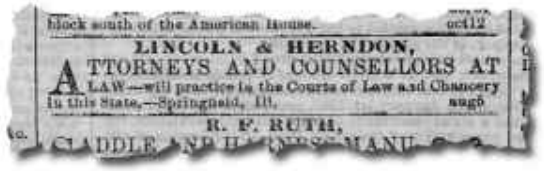
Although attorneys may instruct their clients to delete information from the clients' social media pages that may be damaging to the clients, provided the attorneys' conduct does not constitute spoliation or is otherwise illegal, attorneys must take the appropriate steps to preserve the aforementioned information in the event that it is deemed discoverable or becomes relevant to the clients' cases.

The law of spoliation is designed to prevent the destruction of information by an individual who knows the information is likely to become evidence in a pending lawsuit or a future one that can be reasonably anticipated. A party's destruction of evidence may result in court sanction, dismissal of claim, exclusion of evidence or testimony.

Attorneys may not advise their clients to post false or misleading information on their social media pages, and if an attorney knows that the client has posted false information, the attorney may not present such information as truthful information in the client's case.

- A prosecutor acted unethically when he used a fictitious Facebook identity to chat with alibi witnesses in a murder case, the Ohio Supreme Court held (Disciplinary Counsel v. Brockler, 2016 BL 66525, Ohio, No. 2015-0280, 2/25/16). **No public policy exception excuses Ohio prosecutors from the duty of honesty in their own conduct, no matter how good their intentions**, the justices said in a per curiam opinion.
- The NM Supreme Court has declined to issue a "bright-line ban" on social media use by Judges, but "caution[ed] that 'friending,' online postings, and other activity can easily be misconstrued and create an appearance of impropriety….Judges should make use of privacy settings to protect their online presence but should also consider any statement posted online to be a public statement." (State v. Thomas, 2016 BL 195991, N.M., No. 34,042, 6/20/16).




block south of the American house. oct12

LINCOLN & HERNDON,

ATTORNEYS AND COUNSELLORS AT LAW—will practice in the Courts of Law and Chancery in this State.—Springfield, Ill. aug6

R. F. RUTH,

Attorneys may and do advertise via social media or on a social networking website, but they must do so in compliance with the Rules of Professional Conduct.

Rule 7.2 (ADVERTISING) of the Rules of Professional Conduct provides, in pertinent part: "(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media." Rule 7.2(c) provides that "[a]ny communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content." Advertising via social media or social networking websites is permissible, as it constitutes advertising via the Internet and/or via electronic communication.

Comment 3 to Rule 7.2 pointedly notes that "[t]elevision, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public."

Rule 7.1 (COMMUNICATIONS CONCERNING A LAWYER'S SERVICES) provides that attorneys shall not make false or misleading communications about the attorney or the services they provide. Attorneys should be mindful about communicating jury verdicts and other results obtained on behalf of clients via social media or social networking websites. Comment 3 to Rule 7.1 notes that "an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." When making such comparisons, attorneys should consult Comment 3, which provides that "[t]he inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public."

Pursuant to Rule 7.4 (COMMUNICATIONS OF FIELDS OF PRACTICE AND SPECIALIZATION), West Virginia does not recognize specialization in the practice of law. Attorneys may not state or imply that they are certified as a specialist in a particular field of law. Attorneys may communicate the fact that they do or do not practice in a particular field of law, and may do so via social media or social networking websites, as well.

Rule 7.3 specifically references "real-time electronic contact" and such contact arguably includes contact via social media and social networking websites in the forms of live chats and comments to individual's posts. Unless they have a relationship as described within Rule 7.3, attorneys must be mindful not to solicit clients by real-time electronic contact, among other forms of media discussed, as doing so would violate the Rules of Professional Conduct.

Rule 1.18 (DUTIES TO PROSPECTIVE CLIENT) "(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." A prospective attorney-client relationship may be formed via social media or on a social networking website if an individual's electronic communication with an attorney is determined to be a consultation.

- Can you respond to a negative (or positive) online review?
- If so, what type of response is permissible?
- 2014 Survey by Software Advice, software consulting firm, found:
  - Yelp is (was?) the most popular and trusted site for online reviews (Facebook? Google reviews? Avvo?)
  - 70% of prospective clients would travel further to see an attorney with better online reviews
  - 38% of prospective clients sought out an attorney via internet, compared with 29% asking friends/family
- Marketing experts agree that it is valuable to "claim" your profiles on the various sites and to encourage clients to provide reviews (*Gifford, 2018)*
- NO ASTROTURFING (posting fake reviews or inducing others to do so)
  - Violates attorney's duty of honesty and prohibition against false/misleading advertising
- How to respond to negative reviews?
  - Mostly, experts say "don't."
  - Avvo's suggested response for negative reviews: "We're sorry you had a bad experience with our firm. This matter does not sound familiar and we strive for the utmost client satisfaction in every case. Please contact me directly to discuss your specific concerns."
  - Recent disciplinary cases in GA, IL, CO, and WY have involved sanctions ranging from public reprimands to an 18-month suspension for violations of confidentiality and loyalty to former clients.
  - WV and TX ethics opinions: The self-defense exception in Rule 1.6(b)(5) does not allow lawyers to disclose confidential information in response to a review or endorsement on social media.

L.E.O. 2018-01 Participation in Attorney-Client Matching Services

ACMS model is that the lawyer pays a "marketing fee" for participation in an on-line, lay person owned and operated legal referral service where the service matches the prospective client with a lawyer for legal service.

- lawyer lacks all control over content of the advertising and targets of solicitation
- prospective client chooses the lawyer, but the ACMS defines the types of legal services offered, the scope of representation, and the legal fees charged for the particular service.
- prospective client pays the full amount of the advertised legal fee for the legal services to the ACMS
- ACMS notifies the lawyer, and the lawyer contacts the prospective client– then lawyer either accepts or declines the proposed representation.
- ACMS requires the lawyer to pay the "marketing fee" to the non-lawyer company based upon the fee general from each completed legal matter

At the most fundamental level, the lawyer must ensure that he is competent to provide the representation and under this model, the ACMS controls nearly every aspect of the relationship between the client and the attorney and it is antithetical to the core concept that a lawyer shall exercise competent, independent legal professional judgment on behalf of the client.

The Lawyer Disciplinary Board cautions that the ACMS model is rife with ethical pitfalls for lawyers. These include, but are not limited to, interference with the lawyer's professional judgment, failing to properly safeguard legal fees, fee-splitting with non-lawyers, and improper payments to a business for recommending the lawyer's services. Lawyers have an affirmative obligation to ensure that their relationships with entities are conducted in accord with the RPC.

Although attorneys may comment on and respond to reviews or endorsements on social media or social networking websites, they must be mindful not to disclose confidential client information without the client's consent, as doing so would violate Rule 1.6 of the Rules of Professional Conduct.

Although 1.6(b)(5) permits disclosure of confidential client information under certain circumstances such as to respond to an ethics complaint or a civil suit, attorneys may not disclose such information in response to a review or endorsement, positive or negative, on social media or social networking websites. Any information attorneys post on social media or social networking websites must not violate the confidentiality that exists between the attorney and his or her client.

Attorneys may request that the website or search engine host remove the post for a specific reason.

If an attorney chooses to respond publicly, suggested responses include posting an invitation to contact the lawyer privately to resolve the matter or indicate that professional considerations preclude your response.

See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY Formal Opinion 496 January 13, 2021 Responding to Online Criticism
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-496.pdf

"WHAT SHOULDN'T YOU TEXT?

…Text messaging is a very limited communications method. It works great for letting someone know you're running five minutes late for your luncheon meeting or to pass on a quick congratulations or kudos to someone. But it is very limited and is a poor tool for almost every complex legal discussion. So one needs to learn to use the medium's strengths and avoid its weaknesses. Here are some common-sense examples:

- Let's not do that! Call me to discuss why.
- That's too complicated to discuss via text message. Call my office to schedule an appointment.
- That's an important strategic decision and requires more in-depth discussion." – Jim Calloway & Ivan Hemmans, March 9, 2028, *The 411 on Texting for Lawyers*

10 OBJECTIVES OF SOUND LEGAL PRACTICE...

- Developing competent practice
- Communicating in an effective, timely, professional manner and maintaining professional relations
- Ensuring that confidentiality requirements are met
- Avoiding conflicts of interest
- Maintaining appropriate file and records management systems
- Managing the law firm/legal entity and staff appropriately
- Charging appropriate fees and making appropriate disbursements
- Ensuring that reliable trust account practices are in use
- Working to improve the administration of justice and access to legal services
- Wellness and inclusivity